STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 10, 2005
v	No. 252406 Washtenaw Circuit Court
RICHARD LACY RANDOLPH, Defendant-Appellant.	LC No. 03-000091-FH

Before: Hoekstra, P.J., and Neff and Schuette, JJ.

PER CURIAM.

Defendant appeals as of right his conviction of two counts of third-degree criminal sexual conduct (CSC), MCL 750.520d(1)(a). Defendant was sentenced to fifty-seven months' to fifteen years' imprisonment on each count. We affirm.

I

Defendant became involved in a romantic and sexual relationship with a minor girl. At the time, he was thirty years old and she was fifteen years old. Defendant was an acquaintance of the girl and her mother. In April 2002, the girl left home and lived with defendant for several months. Her mother reported her as a runaway, posted missing person flyers, and sought her return. Defendant took the girl to live in Kentucky with his parents and visited her there. She returned to Michigan in July 2002 and continued to live with defendant. Attempts by the police to contact defendant at his home by telephone and personal visits were unsuccessful.

On August 1, 2002, police were conducting surveillance of defendant's home and saw activity in the home, e.g., lights turning on. Pursuant to a search warrant, police entered the home and found defendant partially nude in the bedroom where the girl was also found. During a search of the home, the police seized various items such as clothing, receipts, and the girl's missing person flyer. The girl eventually admitted to the police that she and defendant had a sexual relationship.

II

Defendant first argues that the trial court erred in denying defendant's motion to suppress the evidence seized from his home because the search warrant affidavit was deficient.[1] We disagree.

We review a lower court's factual findings in a suppression hearing for clear error. *People v Davis*, 250 Mich App 357, 362; 649 NW2d 94 (2002). The findings will be affirmed unless we are left with a definite and firm conviction that a mistake was made. *Id*. We review de novo the lower court's ultimate ruling with regard to the motion to suppress. *Id*.

A search warrant may be issued only on a showing of probable cause that is supported by oath or affirmation. *People v Nunez*, 242 Mich App 610, 612; 619 NW2d 550 (2000). Probable cause exists when a reasonably cautious person would be justified in concluding that evidence of criminal activity could be found in a stated place to be searched. *Id.* A magistrate must "'make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place.'" *People v Hawkins*, 468 Mich 488, 502 n 11; 668 NW2d 602 (2003), quoting *Illinois v Gates*, 462 US 213, 238; 103 S Ct 2317; 76 L Ed 2d 527 (1983). On appeal from a finding of probable cause, a reviewing court must look at the affidavits and determine whether the information contained in the documents could have caused a reasonably cautious person to conclude that, under the totality of the circumstances, there was a substantial basis for the finding of probable cause. *People v Whitfield*, 461 Mich 441, 445-446; 607 NW2d 61 (2000); *People v Echavarria*, 233 Mich App 356, 366-367; 592 NW2d 737 (1999).

Defendant asserts that the affidavit was "bare bones," conclusory, and lacked sufficient factual detail for the magistrate to make an independent finding of probable cause. Specifically, defendant contends that the affidavit failed to establish the credibility of the named informant and that the "tip," was not corroborated by independent investigation. The trial court rejected these arguments, as do we.

Citing MCL 780.653, the trial court observed that information in an affidavit may be provided by a named person upon a showing that the person spoke with personal knowledge. MCL 780.653 provides:

> The magistrate's finding of reasonable or probable cause shall be based upon all the facts related within the affidavit made before him or her. The affidavit may be based upon information supplied to the complainant by a named or unnamed person if the affidavit contains 1 of the following:

[1] Although, as plaintiff points out, defendant initially failed to provide the transcript of the hearing on the motion to suppress, it has since been provided to this Court.

> (a) If the person is named, affirmative allegations from which the magistrate may conclude that the person spoke with personal knowledge of the information.
>
> (b) If the person is unnamed, affirmative allegations from which the magistrate may conclude that the person spoke with personal knowledge of the information and either that the unnamed person is credible or that the information is reliable.

Defendant's arguments concerning credibility and independent investigation apply if the informant is unnamed, pursuant to MCL 780.653(b).

In this case, the tip at issue was provided by a named person, who stated that she was introduced to the victim at the defendant's home, when visiting her boyfriend who resides at the residence, and that while she was there she observed a female that matched photographs of the girl on the missing person flyers. The informant's boyfriend introduced her to the female, whose first name was the same as the missing person. The informant stated that she was at the residence on July 30, 2002, between 6:00 p.m. and 11:59 p.m. and that the missing girl was there during that time. The informant also provided a description of the clothing the victim was wearing. We find no error in the trial court's determination that the affidavit contained affirmative allegations from which a magistrate could conclude that the person spoke with personal knowledge of the information, MCL 780.653(a).

As the trial court noted, the affidavit also stated that the victim's mother twice reported that her daughter may be at defendant's home, and three other relatives had reported that the missing girl was observed at defendant's home. The court properly concluded that the affidavit supported the magistrate's finding of probable cause. Defendant's claim that the trial court erred in denying his motion to suppress is without merit.

III

Defendant challenges his sentence, alleging errors in the scoring of offense variables (OV) 11, 12, and 13, each of which was scored at twenty-five points. Defendant contends that the court erroneously scored OV 12 and OV 13 at twenty-five points each, contrary to the scoring guidelines, which instruct that the same conduct scored in OV 11 must not be also scored in OV 12 and OV 13.[2] According to defendant, the correct scoring would be sixty, placing him in the guideline range of 51-85 months, and he is therefore entitled to resentencing.

Plaintiff argues that no error occurred in scoring OV 12 and OV 13 because defendant committed numerous felonious acts upon the victim, and there was sufficient conduct to score OV 12 and OV 13 separately without duplication. We agree.

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[2] The parties do not dispute that an exception for membership in an organized criminal group pertaining to OV 13 does not apply in this case.

A sentencing court has discretion in determining the number of points to be scored under an offense variable, provided that evidence on the record adequately supports a particular score. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). A scoring decision for which there is any evidence in support will be upheld on appeal. *Id*.

The victim testified at trial that the first time she had sex with defendant was January 30, 2002. The first time, they performed oral sex on each other, and then they "had sex twice." (134-139) She further testified that she and defendant had sexual relations five to fifteen times a week over a period of several months. (T I, 141). On those occasions, they would have both oral sex and vaginal intercourse. (141-142). The trial court scored OV 12, "Contemporaneous Felonious Criminal Acts," at twenty-five points. The scoring of OV 12 is supported by criminal acts that were separate and distinct from those arising out of the sentencing offense.

Likewise, OV 13 was scored at twenty-five points on the basis that "[t]he offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person. MCL 777.43(1)(b)." Evidence established that defendant had sex with the victim repeatedly over a period of months. Under these circumstances, the scoring of OV 13 did not violate the instruction that the sentencing court not consider conduct scored in OV 11.

IV

Defendant also claims that he is entitled to resentencing because the scoring was based on facts that were not determined by a jury beyond a reasonable doubt, *Blakely v Washington*, 542 US ___, 124 S Ct 2531, 159 L Ed 2d 403 (2004). Defendant's claim is premised on the trial court's finding of multiple penetrations in scoring of OV 12 and OV 13, which were not findings by the jury.

In *People v Claypool*, 470 Mich 715, 730 n 14; 684 NW2d 278 (2004), the Michigan Supreme Court noted that the holding in *Blakely* regarding determinate sentencing schemes does not apply to the indeterminate sentencing system in place in Michigan. Defendant is therefore not entitled to resentencing. *Claypool, supra*; *People v Drohan*, 264 Mich App77, 89 n 4; 689 NW2d 750 (2004).

Affirmed.

/s/ Joel P. Hoekstra
/s/ Janet T. Neff
/s/ Bill Schuette